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In The

SUPREME COURT OF THE UNITED STATES

October Term 1975

NO. 75-138

WARREN YEOMANS, ALBERT SCHUHOLZ, WAYNE K. ALLEN, SANDRA ALLEN, DONNA LUX, DONALD GARRETT, ANN GARRETT, MELVIN FORSYTH and ROSEMARY FORSYTH ..... PETITIONERS

VS:

COMMONWEALTH OF KENTUCKY, KENTUCKY DEPARTMENT OF BANKING AND SECURITIES, KENTUCKY DIVISION OF SECURITIES, STATE OF OHIO, OHIO DEPARTMENT OF COMMERCE, and OHIO DIVISION OF SECURITIES ..... RESPONDENTS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PROCEEDING BELOW

This petition seeks review of *Yeomans* v. *Commonwealth of Kentucky,* 515 F.2d 993 (6th Cir. 1975), affirming *Yeomans* v. *Department of Banking and Securities,* No. C1-74-284, S.D. Ohio, W.Div., filed July 11, 1974, both of which opinions appear in the Appendix of the Petition at pages 14a and 1a respectively.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1), the proper provision for a decision of the United States Court of Appeals.

QUESTION PRESENTED

WHETHER STATES BY ENACTING STATUTES REGULATING THE SALE OF SECURITIES WAIVE THE IMMUNITY FROM SUIT IN A FEDERAL COURT GUARANTEED TO STATES BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory provisions involved are adequately set forth in the Petition.

STATEMENT

This action is before this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the opinion of the United States District Court for the Southern District of Ohio, Western Division. Speaking for the latter Court, the Honorable Timothy S. Hogan, Judge, held that neither the entry by a state into an undefined field subject to federal regulation, nor its failure to administer its own laws in that field, furnish any basis for a waiver of the Eleventh Amendment or a consent to be sued. Nor may such (co-regulation) be

the foundation on which to rest a construction of congressional acts to include states as persons — at least where the state action is limited to the strictly governmental.

The U. S. Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

ARGUMENT

THE ENACTMENT OF STATUTES BY STATE LEGISLATURES GOVERNING THE REGULATION OF THE SALE OF SECURITIES DOES NOT CONSTITUTE ACTION SUFFICIENT TO DEMONSTRATE A WAIVER OF THE IMMUNITY FROM SUIT IN FEDERAL COURTS GUARANTEED STATES BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A.

By reason of the Eleventh Amendment, Federal Courts lack jurisdiction to entertain suits against unconsenting States. The Eleventh Amendment states:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

It has been long established that unconsenting *States* are immune from suits by their *own* Citizens as well as Citizens of another State. *Hans* v. *Louisiana,* 134 U.S. 1, (1890); *Duhne* v. *New Jersey,* 251 U.S. 311; (1920); *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47;

(1945); *Parden* v. *Terminal R. Co.*, 377 U.S. 184; (1964); *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279; (1973).

The Respondents, Kentucky Department of Banking and Securities and Kentucky Division of Securities are duly created agencies of the Respondent Commonwealth of Kentucky. Any suit against these agencies is in fact a suit against the Commonwealth of Kentucky and is likewise barred by reason of the Eleventh Amendment. *In re Ayers*, 123 U.S. 443 (1887). *Ford Motor Co.* v. *Treasury Dept.*, 323 U.S. 459 (1945); *Hamilton Mfg. Co.* v. *Trustees of State Colleges in Colo.*, 356 F.2d 599 (10 Cir., 1966); *Williams* v. *Eaton*, 443 F.2d 422 (10 Cir. 1971).

B.

The Kentucky Respondents have not consented to suit in the Federal Court, have not waived their immunity from such suit, and the United States Congress has not in any way abrogated these Respondents' immunity from suit in Federal Court.

The Petitioners will contend that States may constructively waive the immunity guaranteed by the Eleventh Amendment and will further contend that the Kentucky Respondents have so constructively waived their immunity. The Petitioners have relied principally on *Parden* v. *Terminal R. Co.*, 377 U.S. 184; (1964); *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279; (1973); *Petty* v. *Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, (1959); and *Forman* v. *Community Services, Inc.*, 500 F.2d 1246, (1974). It is therefore necessary to examine

the concept of *constructive waiver* in light of this Court's recent opinion as to same.

In *Edelman* v. *Jordan,* 415 U.S. 651; (1974), it was argued without success that the State of Illinois had constructively waived its imunity under the Eleventh Amendment by participating in Federal State programs of Aid to the Aged, Blind and Disabled.

This Court stated:

"Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. *In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction'* "

Murry v. *Wilson Distilling Co.,* 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909). We see no reason to retreat from the Court's statement in *Great Northern Insurance Co.* v. *Read,* 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1945) (footnote omitted):

> '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration, *a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'* ". (Emphasis Added) p. 673)

The Court thus held that:

"The mere fact that a State participates in a program

through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." (p. 673)

Thus it is clear that the Eleventh Amendment to the United States Constitution presents, on its face, a bar to suits brought against unconsenting states in Federal Courts. While it is acknowledged that states may consent to be sued in Federal Courts, such consent will not be lightly inferred, but must be clearly and unequivocally shown to have occured. The authorities relied upon by the Petitioners will not support their contention that the Kentucky Respondents have consented to suit in this litigation.

The Petitioners' allegation that there exists a conflict between the Circuit Courts of this nation with regard to the question presented appears to be without merit. Petitioners reliance on *Forman* v. *Community Services, Inc.,* 500 F.2d 1246 (2d Cir. 1974) seems particularly misplaced.

The facts in *Forman* do not parallel the facts in the instant case. In *Forman* the State of New York was actively engaged in providing low-cost public housing and in so doing engaged in the securities business much in the same way as ordinary industrial corporations would do. The State of New York lent its credit to and provided the organizational machinery for a massive effort to mobilize capital for cooperative building projects. New York and its agencies were directly active in the sale of securities.

In the case at bar, the Comonwealth of Kentucky and its agencies are in the role of regulators only. The theory

underpinning Petitioners claim against the Commonwealth and its agencies is simply that the State engaged in the field of regulation contemporaneously with a federal agency and thereby waived its protection from suit provided by the Eleventh Amendment of the Constitution of the United States. This is the type of problem the Court addressed itself to in *Edelman* v. *Jordan* Supra. and would seem to have been firmly settled by the decision in that case.

It is respectfully submitted that the issue at bar more similarly resembles that presented in *MacKethan* v. *Commonwealth of Virginia,* 508 F.2d 838 (4th Cir. 1974). This Court on June 23, 1975 denied certiorari in *MacKethan* (74-1198 ;43 L.W. 3672).

Whatever conflict may have been caused by the Second Circuit's decision in Forman *Supra.,* and these Respondents find none, would seem to have been nullified by this Court's recent action in *United Housing Foundation, Inc.* v. *Forman,* _____ U.S. _____; 44 L.Ed. 621 (June 16, 1975). This Court reversed the Second Circuit's holding in *Forman* and found that the particular contracts sold by New York State agencies were not in fact securities as that term is defined in the Securities Act of 1933 and the Securities Exchange Act of 1934, and therefore the civil liability provisions of these last mentioned Acts could not apply. Since this Court has now stated that the Second Circuit was not dealing with "securities" at the time it entered its decision in *Forman,* it would seem that the validity of that decision stands in the hypothetical only.

SUMMARY

The long history and tradition of the Eleventh Amendment makes quite clear that states are immune from suit in federal courts unless they consent to such suit or it is determined that they have waived that immunity. No consent has been alledged and judging waiver in light of the test described in *Edelman* v. *Jordan Supra.* It is clear that no waiver has occurred.

Notwithstanding the diminished precedential value of *Forman* v. *Community Service, Inc. Supra.,* it is clear from an examination of the facts in these cases that no conflict between the Second and Sixth Circuits exists even if this Court had not taken the action it did in *United Housing Foundation Inc.,* v. *Forman Supra.* It is respectfully submitted that the legal theory advanced by the Petitioner in this action is that rejected in *MacKethan* v. *Commonwealth of Virginia Supra.,* and therefore certiorari should be denied in this case.

Respectfully submitted,

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Kentucky Department of
Banking and Securities and
Kentucky Division of Securities

CERTIFICATE OF SERVICE

I, Thomas C. Jacobs, Counsel for Respondents aforesaid, hereby certify that the foregoing Brief in Opposition to the Petition for Certiorari was served on Petitioner by depositing copies of same in the United States mail, first-class, postage pre-paid on ~~August~~ SEPTEMBER 16TH, 1975, addressed to Hon. Robert E. Manley, 2205 Carew Tower, Cincinnati, Ohio, 45202, Counsel for Petitioners and upon the Ohio Respondents by depositing copies of same in the United States mail, first-class, postage pre-paid, on ~~August~~ SEPTEMBER 16TH, 1975, addressed to Hon. Ira Owen Kane, 57 East Gay Street, Columbus, Ohio, 43215, Counsel for said Respondents in the proceeding in the United States Court of Appeals for the Sixth Circuit.

Thomas C. Jacobs

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